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February 15, 2022

Via Electronic Submission

Marlene H. Dortch, Secretary  
Federal Communications Commission  
45 L St. NE  
Washington, DC 20554

**Ex Parte Submission**

Re: *Petition for Emergency Relief in 3G Sunset Transition for Central Station Alarm Subscribers*, GN Docket No. 21-304

Dear Ms. Dortch:

This responds to Public Knowledge's February 7, 2022 letter in support of the alarm industry's petition to slam the brakes on AT&T's 3G-to-5G transition.<sup>1</sup> AT&T has worked tirelessly to help affected customers prepare for that transition so that they will remain with AT&T. It has given all customers at least three years' notice of its 3G sunset, offered consumers free and discounted devices, given business customers more than \$100 million in incentives to replace obsolete 3G devices, and tailored other solutions for business customers with unique transition needs. It is thus unsurprising that less than 1% of AT&T's mobile data traffic still uses 3G technology. Public Knowledge nonetheless continues to oppose AT&T's 5G transition plans based on the same meritless rationales AT&T has already refuted. What *is* new in Public Knowledge's February 7 filing, however, is a remarkable proposal to short-circuit lawful Commission processes. Public Knowledge urges the Chairwoman's office to direct "the Wireless Bureau" to issue an order granting the alarm industry's petition "pursuant to delegated authority"<sup>2</sup> precisely because, as Public Knowledge elsewhere acknowledges, such an order *would not win the support of a majority of sitting Commissioners*. In other words, Public Knowledge proposes to cut the non-Chair Commissioners out of the loop because of legal and policy disagreements at the Commission level about a matter of exceptional public importance. That strategy would be lawless.

1. As we have previously discussed, AT&T's 3G network occupies ten critical megahertz of 850 MHz spectrum and uses a UMTS technology that was launched in 2004, three years before the first iPhone.<sup>3</sup> Unlike Verizon's 3G technology, which requires much less dedicated spectrum,

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<sup>1</sup> Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Sec'y, FCC, GN Docket No. 21-304 (Feb. 7, 2022) ("PK 2/7/2022 Ex Parte").

<sup>2</sup> PK 2/7/2022 Ex Parte at 3.

<sup>3</sup> See Opposition of AT&T, GN Docket No. 21-304, at 2 (Aug. 30, 2021) ("AT&T 8/30/2021 Opp.").

UMTS requires at least ten megahertz to support *even a single customer*.<sup>4</sup> Because only a relative handful of AT&T customers still use 3G technology, AT&T's 3G network is now operating at less than 4% of capacity—a gross waste of the nation's scarce spectrum resources.<sup>5</sup> That underutilized swath of 850 MHz spectrum, with its favorable propagation characteristics, is now critical to AT&T's ability to support high-performing 5G connectivity in all areas of the United States, particularly near the boundaries of C-Band coverage.<sup>6</sup> AT&T thus publicly announced three years ago, in February 2019, that it would sunset its 3G network in early 2022 and repurpose this spectrum to 5G. Over the ensuing three years, AT&T has worked diligently to help its customers, including business customers, manage the transition. But further delay would severely disrupt AT&T's network plans to the detriment of tens of millions of consumers and businesses across the nation.<sup>7</sup>

Public Knowledge parrots the alarm industry's assertion that, despite those network harms, further delay is necessary on the ground that COVID and supply chain shortages are to blame for the failure of some alarm companies to upgrade all of their customers' 3G devices.<sup>8</sup> As we have discussed, that rationale for delay contradicts the public assurances that alarm company executives have given investors about the limited business impact of the pandemic and chip shortages.<sup>9</sup> Indeed, the nation's largest alarm company—ADT—told investors in November that it had “successfully completed 85%” of its “3G replacements” and “remain[ed] on track for full completion for AT&T customers by the February 2022 sunset date.”<sup>10</sup>

Granted, just as some companies dragged their heels in the face of prior technological transitions, some alarm companies have evidently not made 3G replacements a priority over the past three years. Those companies will now face competition from ADT and others for retention of any small number of remaining customers that may have obsolete alarm systems. But neither the alarm industry nor Public Knowledge has explained why this Commission should compromise America's 5G objectives to protect the competitive interests of a subset of companies in an industry it does not even regulate.

In all events, the Commission lacks authority over this dispute because (among other considerations) the IoT services that AT&T provides to alarm companies—the sole topic of the only petition before this Commission—are not common carrier services subject to Title II

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<sup>4</sup> *Id.* at 10-12.

<sup>5</sup> *See id.* at 2.

<sup>6</sup> *See id.* at 9-10.

<sup>7</sup> *See id.* at 9-12; Letter from Robert Vitanza, AT&T, to Marlene H. Dortch, Sec'y, FCC, GN Docket No. 21-304, at 9-11 (Oct. 28, 2021) (“AT&T 10/28/2021 Ex Parte”).

<sup>8</sup> PK 2/7/2022 Ex Parte at 1.

<sup>9</sup> *See* AT&T 8/30/2021 Opp. at 14-22, 24-26; AT&T 10/28/2021 Ex Parte at 5-9.

<sup>10</sup> ADT Inc., FQ3 2021 Earnings Call Transcripts at 4 (S&P Glob. Mkt. Intel. Nov. 9, 2021) (statement of CEO James D. DeVries).

regulation.<sup>11</sup> Public Knowledge ignores that fundamental point in relying on Title II provisions as legal authority for its proposed moratorium.<sup>12</sup> All of the Title II provisions cited by Public Knowledge are irrelevant here because neither it nor anyone else has filed a petition seeking the Commission's intervention on behalf of consumers who subscribe to Title II telecommunications services such as ordinary voice plans.<sup>13</sup> That is for good reason: AT&T has been regularly contacting its voice customers about the 3G sunset and *giving away 4G and 5G phones for free* to keep them connected.<sup>14</sup> Any reliance on Title II voice services to mandate the alarm industry's proposed delay in AT&T's 3G sunset would thus be arbitrary and pretextual.

2. Public Knowledge recognizes that there are not three votes for granting the alarm industry's petition. Indeed, the signatory of Public Knowledge's February 7 letter has publicly cited "avoiding the [perceived] 2-2 deadlock" as his sole reason for proposing that "the Wireless Bureau ... act independently on delegated authority."<sup>15</sup> Public Knowledge has now doubled down on that proposal. As disclosed by a parenthetical in its February 7 letter, Public Knowledge has urged the Chairwoman's office to direct "the Wireless Bureau" to impose a moratorium order on AT&T "pursuant to delegated authority."<sup>16</sup> That approach would be lawless.

Congress created a multi-member Commission precisely because it understood that reasonable people can disagree about hard questions of telecommunications law and policy, and it wanted Senate-confirmed individuals to resolve those questions by a majority vote.<sup>17</sup> Those are not the types of questions that staff may resolve on delegated authority. Delegated authority extends only to straightforward applications of established Commission rules and precedent, not to novel questions of law or policy that might engender disagreements among sitting Commissioners. The Commission's regulations on delegated authority make this point explicitly, providing that the Wireless Bureau Chief "shall not have authority to act on any complaints, petitions or requests

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<sup>11</sup> See AT&T 10/28/2021 Ex Parte at 1-4 (addressing putative sources of authority under Titles I, II, and III); AT&T 8/30/2021 Opp. at 6-9.

<sup>12</sup> PK 2/7/2022 Ex Parte at 2-3.

<sup>13</sup> Public Knowledge's suggestion (at 2) that the Commission rely on Section 214 as a basis for an injunction is meritless for two additional reasons: (1) the Commission forbore from applying Section 214 to CMRS in 1994, see Second Report & Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, ¶ 182 (1994), and (2) AT&T is not even "discontinuing" any "service"; it is simply changing the technology used for the same services.

<sup>14</sup> See Reply Comments of AT&T, GN Docket No. 21-304, at 4-7 & n.22 (Sept. 14, 2021), at 4-7 & n.22.

<sup>15</sup> Howard Buskirk, *Alarm Industry Turns to White House on AT&T 3G Shutdown*, Commc'n's Daily, at 5 (Feb. 3, 2022) (quoting Public Knowledge Senior Vice President Harold Feld). It is presumptuous of Public Knowledge to assume that two Commissioners would vote to take the unprecedented and unlawful action proposed in the alarm industry's petition. But we will take this "2-2" assumption at face value for purposes of discussing delegated authority.

<sup>16</sup> PK 2/7/22 Ex Parte at 3.

<sup>17</sup> See 47 U.S.C. § 154.

... when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines.”<sup>18</sup>

That regulation is binding until formally rescinded after notice and comment. And it forecloses the Bureau from issuing an order that, in whatever guise, grants the relief sought in the alarm industry’s petition—a delay in AT&T’s 5G transition. That petition and our opposition raise many “new or novel questions of law or policy,”<sup>19</sup> including (1) questions about the Commission’s legal authority to act on the petition in the first place, (2) the reasonableness of AT&T’s three-years-plus notice of the coming sunset, and (3) whether the costs of delaying the 5G transition outweigh the marginal benefits of a delayed sunset for some companies in one industry. In addition, the alarm industry has not even alleged that AT&T has violated any existing Commission rule. It has instead asked the Commission to take one-off action against a single provider in the *absence* of rules, overriding private contracts in the process.<sup>20</sup> That request inherently raises “new or novel questions of law or policy.”<sup>21</sup>

More broadly, it would also be obvious to any observer that a Bureau-level order granting the alarm industry’s petition was issued by the Bureau rather than the Commission precisely because the petition is so controversial that a majority of sitting Commissioners would not vote to grant it. If there were any doubt on that point, Public Knowledge has dispelled it through its own public advocacy for this backdoor means of “avoiding the [presumed] 2-2 deadlock.”<sup>22</sup>

Finally, the same presumed “2-2 deadlock” that Public Knowledge attributes to the Commission, and that it proposes a Bureau-level order to “avoid[],”<sup>23</sup> would insulate the Bureau’s order from meaningful review by the Commission. Such an order would thus have the same irreversible effects as a Commission-level order granting the alarm industry’s petition: it would force AT&T to delay refarming 850 MHz spectrum from 3G to 5G and deny consumers across the country the full benefits of 5G. The main difference is that a Bureau-level order would produce that outcome without any participation by the non-Chair Commissioners. The unlawfulness of that approach would be apparent to Congress and the public—and to a reviewing court. Although a “2-2 deadlock”<sup>24</sup> would—by design—preclude meaningful Commission review, judicial review on mandamus would remain available for prompt correction of such an unprecedented abuse of the administrative process.

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Again, AT&T has a strong interest in helping its customers manage the 5G transition, and it has taken proactive steps for years to make that transition as seamless for them as possible. We will maintain that same customer-centric focus in the days before and after the February 22 sunset.

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<sup>18</sup> 47 C.F.R. § 0.331(a)(2).

<sup>19</sup> *Id.*

<sup>20</sup> See AT&T 8/30/2021 Opp. at 12-13.

<sup>21</sup> 47 C.F.R. § 0.331(a)(2).

<sup>22</sup> Buskirk, *supra*, at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Marlene H. Dortch  
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In accordance with section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Vitanza", with a long horizontal flourish extending to the right.

Robert Vitanza